LEONG BON HUAT

v.

PENDAKWA RAYA

SUPREME COURT, KUCHING
TAN SRI DATUK MOHD. JEMURI
B. SERJAN CJ (BORNEO),
TAN SRI DATUK EDGAR
JOSEPH JR. SCJ,
DATUK MOHAMED DZAIDDIN
BIN HJ. ABDULLAH SCJ
[CRIMINAL APPEAL NO. 05-47-92]
2 AUGUST 1993

DANGEROUS DRUGS: Chemist giving evidence that plant material was cannabis - Appeal against conviction and sentence - Whether testimony of Chemist had proven beyond reasonable doubt that bulk of dried leaves was cannabis within the meaning of s. 2 Dangerous Drugs Act 1952.

The appellant was convicted in the High Court at Kuching for trafficking in cannabis weighing 793.85 grammes in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and sentenced to death.

The Government Chemist, to whom the dried leaves were sent for examination and analysis, concluded that the leaves were cannabis within the meaning of s. 2 of the Act. It was in evidence that the total weight of the samples taken for analysis was "more than 10%" of the net weight of the plant material and that the chemist did not take any sample from the balance of the plant material for analysis.

The question that arose was whether the grounds upon which the Chemist arrived at the conclusion that the plant material was cannabis as defined in s. 2 of the Act could withstand the test of strict *curial* scrutiny.

Held:

[1] The expression "more than 10%" was ambiguous and there should be no ambiguity on such a matter where the life of a subject was at stake. What was necessary was that the testimony of the Chemist upon such a matter must be clear and convincing.

[2] The testimony of the Chemist, at best, established that the appellant was in possession of a little more than 79.30 grammes of cannabis, which was well below the statutory minimum of 200 grammes of cannabis required for the operation of the presumption of trafficking under s. 37(da) of the Act.

[3] While the result of the physical examination by the Chemist might well establish, on a balance of probabilities, that the plant material was cannabis within the meaning of s. 2 of the Act, it was necessary to take the matter further and establish beyond any reasonable doubt that that was so.

[4] The samples of plant material upon which the Chemist had carried out the chemical tests were inadequate, having regard to the total weight of the plant material.

[5] Where the Court was left in doubt as to whether the Accused has committed an offence in a lower or higher degree of seriousness, the Court should make a finding in the lower degree, particularly where a finding in a higher degree will give rise to a mandatory sentence of death. So far as the charge of trafficking in cannabis was concerned, the case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty.

[Appeal allowed. Conviction and sentence set aside. In lieu thereof, appellant convicted of an offence for possession of cannabis and sentenced to life imprisonment with ten strokes of the rottan].

[**Bahasa Malaysia** Translation of Headnote]

DADAH BERBAHAYA: Ahli kimia memberikan keterangan bahawa material tumbuhan adalah ganja - Rayuan terhadap kesabitan kesalahan dan hukuman - Sama ada keterangan Ahli Kimia telah membuktikan di luar keraguan yang munasabah bahawa himpunan daun-daun kering tersebut adalah ganja dalam lingkungan tafsiran s. 2 Akta Dadah Berbahaya 1952.

Perayu telah disabitkan kesalahan dalam Mahkamah Tinggi Kuching bagi pengedaran ganja seberat 793.85 gram bertentangan dengan s. 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta tersebut) dan dijatuhkan hukuman mati.

Ahli Kimia Kerajaan, kepada siapa daun-daun kering tersebut dihantar untuk pemeriksaan dan analisa, menyimpulkan bahawa daun-daun tersebut adalah ganja dalam lingkungan tafsiran s. 2 Akta tersebut. Dalam keterangan dinyatakan bahawa berat contoh yang diambil adalah "lebih daripada 10%" daripada berat

bersih material tumbuhan tersebut dan bahawa ahli kimia itu tidak mengambil apa-apa contoh daripada baki material tumbuhan berkenaan untuk analisa.

Persoalan yang timbul adalah sama ada alasan-alasan atas mana Ahli Kimia tersebut membuat kesimpulannya bahawa material tumbuhan itu adalah ganja sebagaimana yang ditakrifkan dalam s. 2 Akta tersebut dapat menghadapi ujian penelitian *curial* yang ketat.

Diputuskan:

[1] Penyataan "lebih daripada 10%" adalah samar dan tidak seharusnya terdapat sebarang kesamaran dalam perkara sedemikian di mana nyawa seseorang itu menjadi penggadaian. Apa yang perlu ialah keterangan Ahli Kimia atas perkara sedemikian mestilah jelas dan menyakinkan.

[2] Keterangan Ahli Kimia tersebut, paling baik, membuktikan bahawa perayu mempunyai dalam milikannya ganja yang beratnya lebih sedikit daripada 79.30 gram, yang mana merupakan jauh lebih rendah daripada berat minimum statutori iaitu 200 gram ganja yang diperlukan untuk anggapan pengedaran di bawah s. 37(da) Akta tersebut.

[3] Sementara keputusan pemeriksaan fisikal oleh Ahli Kimia mungkin membuktikan, atas imbangan kebarangkalian, bahawa material tumbuhan tersebut adalah ganja dalam linkungan tafsiran s. 2 Akta tersebut, adalah perlu untuk meneliti secara lebih lanjut akan perkara tersebut dan membuktikannya di luar keraguan yang munasabah bahawa ia adalah sedemikian.

[4] Contoh material tumbuhan di mana Ahli Kimia tersebut telah menjalankan ujian kimia ke atasnya adalah tidak mencukupi, dengan mengambilkira jumlah berat material tumbuhan tersebut.

[5] Di mana Mahkamah merasa ragu-ragu berkenaan dengan sama ada Tertuduh telah melakukan suatu kesalahan di bawah darjah keseriusan yang rendah atau tinggi, Mahkamah haruslah membuat suatu keputusan di bawah darjah yang rendah, terutamanya di mana keputusan di bawah darjah yang tinggi akan membawa kepada hukuman mandatori iaitu hukuman mati. Sejauh mana tuduhan tersebut adalah berkenaan dengan pengedaran ganja, kes terhadap perayu tidak dibuktikan dengan kepastian yang dikehendaki untuk menjustifikasikan keputusan bersalah.

[Rayuan dibenarkan. Kesabitan kesalahan dan hukuman diketepikan. Sebagai gantinya, perayu telah disabitkan kesalahan sebagai memiliki ganja dan dijatuhkan hukuman penjara seumur hidup dengan dirotan sebanyak 10 kali].

Cases referred to:

PP v. Ang Soon Huat [1991] 1 MLJ 1 ***(refd)***
R v. Wallace 23 Cr App Rep 32, 35 CCA ***(refd)***
Jubri v. PP [1962] MLJ 34, 35 CA ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 37(da), 39(A), B(1)(a)

For the appellant - Bong Ah Loi; M/s. Jaini Mardi & Associates
For the respondent - Mohd. Zaki bin Md. Yasin, DPP

JUDGMENT

Edgar Joseph Jr. SCJ:

The appellant was convicted in the High Court at Kuching for trafficking in a dangerous drug, to wit, cannabis weighing 793.85 grammes, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and sentenced to death. It was alleged that the offence was committed on the afternoon of 10 May 1988 in front of a coffee shop called Chop Poh Hin, No. 40, Jalan Wong Tsap En, Limbang, in the State of Sarawak.

We do not propose to discuss the facts at any great length because it was proved up to the hilt, and indeed freely admitted by the appellant, that at the time of his arrest he was standing outside the coffee shop, with a black bag slung over his shoulder from which there was recovered - amongst other personal items - a bulk of dried leaves believed to be cannabis wrapped in Chinese newspaper and his Malaysian Passport.

The dried leaves were promptly sent to the Government Chemist Mr. Tan Ching Chee (PW 5) for examination and analysis and he concluded that it was cannabis within the meaning of s. 2 of the Act, in weight 793.85 grammes.

The only defence put forward at the trial before Mr. Justice Dennis Ong Jiew Fook (sitting alone) was that the cannabis was planted in the bag. That defence was, however, rejected by the trial Judge who, in the event, convicted the appellant and sentenced him to death.

Before us, the conviction was attacked on two grounds: namely, that the way in which the trial Judge dealt with the defence was unsatisfactory and alternatively, that the testimony of the Chemist did not prove beyond any reasonable doubt that the bulk of dried leaves was cannabis within the meaning of s. 2 of the Act.

It is sufficient if we said that so far as the first of these grounds is concerned, no exception could be taken to the careful and thorough manner in which the trial Judge dealt with it.

The appellant was, however, on firmer ground so far as his second ground was concerned.

Now, the Chemist had, as we have said, testified that he had examined and analysed the bulk of dried leaves and found it to be 793.85 gms. of cannabis.

Explaining how he arrived at this conclusion he said this:

> I conduct a visual examination of the content of "E1" and then I took samples of the content of dried plant matter. I examined the samples using chemical methods and also conducted microscopic examination. I took samples from various positions of each layer of the dried plant matter and I examined and analysed such samples individually.

It will be seen that he made no mention of the results of his physical examination; for example, he did not say that the plant material was all of the same type and physical features as that of cannabis, nor did he say what were the results of his microscopic examination. Did he notice any resin in the plant material? If so, in what quantity was it present? Nor did he tell the Court as to what were the tests he conducted using chemical methods; for example, did he resort to the Dequenois Levine test and/or the Thin Layer Chromatography test? If so, what were the results of those tests?

But, more importantly, under re-examination by the Deputy Public Prosecutor the Chemist said this:

> I did not obtain the weight of each sample taken but the total weight of samples taken for analysis is more than 10% of the net weight of 793.85 gms.

And, it was only in answer to the Court, at the end of his re-examination that he said:

> The dried plant matter is cannabis as defined in s. 2 of the DDA 1952. I examined it in accordance with the definition in the DDA 1952.

But, the crucial point was whether the grounds upon which he arrived at the conclusion that the plant material was cannabis as defined in s. 2 of the Act could withstand the test of strict *curial* scrutiny.

It is obvious that from the extracts of the testimony of the Chemist, the following plain facts emerge:

First, the total weight of the plant material said to be cannabis was 793.85 grammes.

Second, the total weight of the samples taken for analysis was "more than 10% of the net weight of 793.85 gms." of plant material.

Third, the Chemist did not take any sample from the balance of the plant material (which formed a very substantial part of the whole) for analysis.

Now, what does "more than 10% of the net weight of 793.83 gms" mean? Does it mean 11% or 12% or 13% or more than that? Not to put too fine a point on it, the expression "more than 10%" is ambiguous and there should be no ambiguity on such a matter where the life of a subject is at stake. What is necessary is that the testimony of the Chemist upon such a matter must be clear and convincing.

To take the point a little further, if by the expression "more than 10% of the net weight of 793.85 gms" means a little more than 10% - and we think, in ordinary parlance, it would not be incorrect to say that it bears such a meaning - then, as a matter of simple arithmetic, the testimony of the Chemist, at best, established that the Appellant was in possession of a little more 79.30 gms of cannabis, which would be well below the statutory minimum of 200 grams of cannabis required for the operation of the presumption of trafficking under s. 37(da) of the Act.

It is true that the Chemist did say that he had conducted a physical examination of the whole of the plant material, by which, we suppose, he meant a visual examination, aided no doubt by a microscope. But while the result of such an examination might well establish, on the balance of probabilities, that the plant material was cannabis within the meaning of s. 2 of the Act it was necessary to take the matter further and establish beyond any reasonable doubt that

that was so. This further step would, of necessity have involved, the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice it to say, that in the present case, we were not satisfied that the samples of plant material upon which the Chemist had carried out the chemical tests, were adequate, having regard to the total weight of the plant material, for the reasons stated.

We note that in the Singapore case of *PP v. Ang Soon Huat* [1991] 1 MLJ 1 where one of the contentions advanced by Counsel for the Accused was similar to that advanced in the present appeal, and where the contention was upheld, the Court having reminded itself of the criminal standard of proof, had concluded that where the Court was left in doubt as to whether the Accused has committed an offence in a lower or higher degree of seriousness, the Court should make a finding in the lower degree, particularly where a finding in a higher degree will give rise to a mandatory sentence of death.

The result, therefore, was that so far as the charge of trafficking in cannabis in contravention of s. 39(B) was concerned, "the case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty". (Per Lord Hewart, CJ in *R v. Wallace* 23 Cr App Rep 32, 35 CCA applied by Thomson, CJ in *Jubri v. PP* [1962] MLJ 34, 35 CA). Accordingly, we had no option but to allow the appeal, to quash the conviction for trafficking in cannabis, to set aside the sentence, and to substitute *in lieu* thereof, a conviction for possession of cannabis in contravention of s. 39(A) of the Act and a sentence of life imprisonment to take effect from the date of arrest, with the mandatory ten strokes of the rottan.

RAJA ZAINAL ABIDIN BIN RAJA HAJI TACHIK & 3 ORS.

v.

BRITISH-AMERICAN LIFE & GENERAL INSURANCE BHD.

SUPREME COURT, KUALA LUMPUR
TUN DATO' SERI ABDUL HAMID BIN OMAR LP, DATO' PEH SWEE CHIN SCJ, DATUK MOHAMED DZAIDDIN BIN HJ ABDULLAH SCJ
[CIVIL APPEAL NO. 02-317-91]
29 JULY 1993

PRACTICE & PROCEDURE: Claim for moneys due and owing - Negotiated settlement of claim - Application to strike out statement of claim - O. 18 r. 19 Rules of the High Court 1980 - Lower Court dismissing application - Appeal against decision of lower Court.

The defendants, being beneficial owners of shares in a company, sold their respective shares or shareholdings in the company to the plaintiff by an agreement dated 15 February 1985. Under the sale agreement, the defendants undertook, jointly and severally, to pay the plaintiff sums of money which represented the shortfall in the combined operating profits and the total value of the total assets of the company and its subsidiaries.

The seventh defendant and a subsidiary of the plaintiff entered into negotiations for settlement after the suit had been filed. The seventh defendant proposed to pay certain sums in full and final settlement, one of the conditions being that the plaintiff withdraw the suit against the defendants. This proposal was accepted by the subsidiary of the plaintiff without qualification and the sums proposed to be payed were duly paid.

Relying on the settlement the defendants applied to strike out the plaintiff's statement of claim, under O. 18 r. 19 Rules of the High Court 1980 (RHC 1980), on the grounds that the statement of claim was scandalous, frivolous and vexatious or that it would prejudice, embarrass and delay the fair trial of the action.

The plaintiff on the other hand, contended that the settlement could not operate as a release of the defendants from the plaintiff's claim in the suit. The Registrar allowed the defendants